

STATE OF MICHIGAN
COURT OF APPEALS

TRI-COUNTY INTERNATIONAL TRUCKS,
INC., and IDEALEASE OF FLINT,

UNPUBLISHED
October 25, 2005

Plaintiffs-Appellants,

v

HILLS' PET NUTRITION, INC.,

No. 255695
Lenawee Circuit Court
LC No. 02-000986-CK

Defendant-Appellee.

Before: Cavanagh, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting summary disposition in favor of defendant and denying summary disposition to plaintiffs. We affirm in part, reverse in part, and remand.

On appeal, plaintiffs first argue that the grant of summary disposition against plaintiff Tri-County International Trucks, Inc. ("Tri-County"), was improper. This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion brought pursuant to MCR 2.116(C)(10) should be granted when, after considering the submitted documentary evidence in the light most favorable to the nonmoving party, there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(G)(5); *Ritchie-Gamester v Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999); *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001).

Contracts of indemnity are construed like contracts generally. *Hubbell, R & C, Inc v Jay Dee Contractors, Inc*, 249 Mich App 288, 291; 642 NW2d 700 (2001). "When the terms of a contract are unambiguous, their construction is for this Court to determine as a matter of law." *Id.* "The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties." *Zurich Ins Co v CCR & Co (On Reh)*, 226 Mich App 599, 603; 576 NW2d 392 (1997) (internal quotes and citation omitted). The Court must determine the intent of the parties "by reference to the contract language alone," and may not look to extrinsic evidence to assess intent. *Hubbel, R&C, supra*. But in "construing any contract, whether one of indemnification or otherwise, the court will ascertain the intent of the parties both from the language used and from the surrounding circumstances." *Zurich Ins Co, supra* at 607. But, indemnification contracts are construed most strictly against the indemnitee. *MSI Constr Managers, Inc v Corvo Iron Works, Inc*, 208 Mich App 340, 341; 527 NW2d 79 (1995).

The indemnification terms of the 1992 Lease Agreement (the “national agreement”) provide, in pertinent part:

Customer agrees to indemnify and hold Lessor, Owner, IDEALEASE, INC., and all Authorized Members harmless from and against:

A. Any claim or cause of action for death or injury to persons or loss or damage to property, arising out of or caused by the ownership, maintenance, use or operation of any Vehicle covered by this Agreement.

B. All liability for death of or injury to Customer, its employees, drivers, passengers or agents arising out of the ownership, maintenance, use or operation of any Vehicle covered by this Agreement.

The addendum provides the following exception: “Unless such action is proved to be the direct responsibility or negligence of the Lessor”

“Lessor” appears in both the national agreement and the addendum. The “Lessor” is identified in the first lines of the national agreement as Idealease Services, Inc. Thus, the term “Lessor,” when used in either location, must refer to Idealease Services, Inc. Defendant admits in its brief that “Idealease Services, Inc. was the ‘Lessor.’” The term “Lessor” must mean the same thing when it appears in the national agreement as when it appears in the addendum to the national agreement, because the language of a contract must be given its plain and ordinary meaning. *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997). Therefore, where the addendum excludes indemnity for the “direct responsibility or negligence of the Lessor,” it does not except indemnity for the negligence of plaintiff Tri-County.

Defendant argues, however, under the indemnification language of the main body of the national agreement, that Tri-County does not qualify under any of the categories of entities entitled to indemnity, namely, “Lessor, Owner, IDEALEASE, INC., and all Authorized Members.” First, Tri-County does not qualify as “Lessor” since, in the first lines of the national agreement, the “Lessor” is identified as Idealease Services, Inc. Second, defendant attached title documents indicating that Tri-County sold the truck in question; thus, Tri-County is not the “Owner.” Third, Tri-County is obviously not Idealease, Inc. Tri-County claims that it falls within the language of “all Authorized Members.” There is a Schedule A attached to the national agreement listing Tri-County as an Authorized Member “for vehicles shown on this Schedule A.” That Schedule A is from 1994 and does not “show” the truck in question. But the “all” qualifier is expansive and indicates an intent that “*all* Authorized Members” be indemnified, not merely the authorized member associated with the truck in question. The words of the bargain struck by the parties must control. *Grand Trunk W RR, Inc v Auto Warehousing Co*, 262 Mich App 345, 351; 686 NW2d 756 (2004). The Court will not change the terms of an agreement for the parties nor make a new agreement. *Purlo Corp v 3925 Woodward Ave*, 341 Mich 483, 487; 67 NW2d 684 (1954). If Tri-County is an authorized member as to some trucks, it must fall within the scope of “*all* Authorized Members.” We conclude, therefore, that Tri-County falls within the last of the categories of entities entitled to indemnity.

With respect to the addendum, defendant contends that this exception applies to preclude Tri-County from receiving indemnity because the action brought by Bruce Head, the person

injured in the truck accident that gives rise to the present dispute, is for plaintiffs' negligence. While plaintiffs point out that the addendum precludes indemnity where "such action is *proved to be* the direct responsibility or negligence of the Lessor," defendant argues that plaintiffs will not be assigned any liability in the Head action except that which corresponds to their respective shares of fault. Michigan did abolish joint liability. MCL 600.2956. "[T]he liability of each defendant for damages is several only and not joint." *Gerling Konzern Allgemeine Versicherungs AG v Lawson*, 472 Mich 44, 50; 693 NW2d 149 (2005), quoting MCL 600.2956. The "liability of each person . . . [is] allocated . . . in direct proportion to the person's percentage of fault." MCL 600.2956. Thus plaintiffs' liability to Head will be several only; so defendant argues, Tri-County should not be able to seek indemnity.

This argument lacks merit. First, as shown above, the addendum only precludes indemnity for "direct responsibility or negligence of the Lessor," and the "Lessor" is Idealease Services, Inc. Second, defendant's argument based on the abolition of joint liability also lacks merit because the abolition of joint liability, MCL 600.2956, does not abolish a common liability for a single injury, for example where there is a settlement and the settling parties seek contribution. See *Gerling, supra* at 56. *Gerling* held that multiple tortfeasors may still bring a contribution action after having settled the underlying action. *Id.* To the extent that a contribution action is analogous to an action for indemnity, *Gerling* suggests that an indemnity claim is not precluded by the abolition of joint liability.

But defendant has cited indemnity cases in which the indemnity language limited the right of indemnity for plaintiff's own negligence, and, as defendant argues, "our Courts enforce that agreement as written." Such cases include *MSI Constr, supra*, where the defendant, Corvo, had to indemnify MSI "provided that any such claim is attributable to bodily injury . . . to the extent caused in whole or in part by any negligent act or omission of the Subcontractor [Corvo] . . ." *MSI Constr, supra* at 342-343. This Court held that such language indicated an intent that Corvo was not obligated to indemnify MSI for MSI's own negligence. *Id.* This principle was also illustrated in *Ormsby v Capital Welding, Inc*, 255 Mich App 165; 660 NW2d 730 (2003), rev'd on other grounds 471 Mich 45 (2004). In light of *Ormsby*, *MSI Construction*, and similar cases enforcing language precluding indemnity for the indemnitee's own negligence, the similar limiting language here might be held to preclude a claim for indemnity which would require defendant to indemnify Tri-County for Tri-County's own negligence.

But, Tri-County argues, the cases relied on by defendant are construction cases in which MCL 691.991 explicitly prohibits indemnity agreements in which the indemnitee is indemnified for its own sole negligence. We disagree. *MSI Construction* does not rely on that statute, but merely interprets and applies contractual indemnity language, even though it is in the construction context. *MSI Constr, supra* at 343-344.

Nevertheless, the indemnification language in the case at bar is distinct from the indemnification language in *MSI Construction* and *Ormsby*. Here, defendant agreed to indemnify Tri-County for any claim arising out of the ownership, maintenance, use or operation of any vehicle covered by the national agreement, except where such action would indemnify plaintiffs for the negligence of the Lessor. Here, the requirements are satisfied because the Head accident arose out of the use of a vehicle covered by the national agreement, and there is no contention that the accident resulted from the negligence of the Lessor, Idealease Services, Inc. In addition, the indemnity language is satisfied under ¶ 10.B. because the liability to Head is a

“liability for . . . injury to Customer, its employees, drivers . . . arising out of the ownership, maintenance, use or operation” of a covered vehicle, since Head was a driver for defendant.

In sum, Tri-County is entitled to indemnification because it falls within the “all Authorized Members” terms of the provision, its claim satisfies the language of the indemnity agreement, the claim is not excepted by the addendum, and the claim is not prohibited by the tort reform statute, MCL 600.2956. Therefore, the trial court erred in granting summary disposition to defendant and in denying Tri-County’s indemnification claim.

The next issue is whether defendant breached a contractual duty to provide insurance to Tri-County. The national agreement’s insurance terms provide:

The party designated on Schedule A shall maintain at all times during the term of this Agreement, at its expense, auto liability insurance . . . for bodily injury and property damage. Said coverage shall include as insureds, *Customer, Lessor, Owner, IDEALEASE, INC., Authorized Members*, and such other parties as determined by Lessor. . . . [Emphasis added.]

The insurance terms further provide:

If Customer is designated to provide Liability Insurance, said insurance shall provide primary coverage . . . , shall include Lessor, Owner, IDEALEASE, INC., Authorized Members and such other parties designated by Lessor as insureds

Defendant argues, first, that the agreement’s insurance terms are “hopelessly ambiguous” because “it is impossible to read the insurance terms of the National Agreement and decide who is supposed to buy insurance for whom.” However, defendant fails to cite any case on ambiguity, or to state a standard for determining when a contract term is considered ambiguous thus the argument is deemed abandoned on appeal. See MCR 7.212(C)(7); *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

Defendant next argues that Tri-County does not qualify under the insurance terms as a party entitled to insurance because it is not a “Customer, Lessor, Owner . . . [or] Authorized Member[.]” Tri-County claims that it is an “Authorized Member.” The Schedule A discussed above suggests that Tri-County is an “Authorized Member,” but only “for vehicles shown on this Schedule A.” There is no “all” qualifier here as there was for the indemnity term, so Tri-County must be considered an Authorized Member only with respect to the trucks listed on that Schedule A. Contracts must be construed to give effect to every word or phrase as far as practicable. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003) The Court must presume that the parties intended to leave out the “all” in this instance. Accordingly, we agree with defendant that Tri-County does not qualify under the “Authorized Member” language, and therefore, is not a party entitled to receive insurance.

Plaintiffs’ next argument is that the grant of summary disposition against Idealease of Flint, Inc. (“Idealease of Flint”), was improper. Idealease of Flint contends that it is entitled to indemnity and insurance under the terms of the 2000 rental agreement. Defendant contends that the rental agreement is invalid because it is unproven who signed it on behalf of defendant and because the national agreement could not be modified by “informal agreement.” Thus, the issue

is whether the rental agreement was breached by defendant vis-à-vis Idealease of Flint. It is axiomatic that no duty can arise, under the rental agreement, unless defendant consented to be bound by it; defendant cites to authorities requiring a meeting of the minds and mutual assent. See *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 548-549; 487 NW2d 499 (1992).

Both sides agree that the identity of the person who signed the rental agreement, purportedly on behalf of defendant, is unknown. Defendant presented an affidavit of one of its employees, Brian Sweet, a team leader in charge of securing trucks to deliver product, stating that whoever purported to sign the rental agreement had no authority to do so. In response, Idealease of Flint points out that the rental agreement had been used many times in the past, without being signed, and defendant acknowledged the contract and performed it. Idealease of Flint presented copies of several of the past rental agreements, contending that defendant paid for the rentals. Also, the rental agreement contained the correct liability insurance policy number covering defendant, and correctly identified Travelers as the insurer. Accordingly, there is evidence presented on both sides of the issue regarding whether defendant executed the rental agreement. In our view, there is a question of fact on the issue of whether defendant, through an authorized representative, executed the rental agreement or otherwise assented to it by accepting the truck and paying for it.

Defendant next argues that the rental agreement had to be signed under the statute of frauds, MCL 556.132. Defendant cites subsection (1)(b), which states that a “promise to answer for the debt, default, *or misdoings* of another person” is void unless in writing and signed “with an authorized signature by the party to be charged.” MCL 556.132(1)(b) (emphasis added). The trial court appeared to confuse the requirement of a signature under the statute of frauds, with the requirement of mutual assent for contracts in general. A signature is only required for those contracts that the statute of frauds requires to have a signature. MCL 556.132. Other contracts require only mutual assent or “meeting of the minds.” *Kamalnath, supra*.

Defendant cites Alabama authority for the proposition that a promise of indemnity falls within statute of frauds language, and in the Alabama case, the statutory language was promises to answer for the “miscarriages of another,” which is arguably different. We have located no Michigan authority for this proposition, nor has defendant cited any. We will not search for authority to support a party’s position. See *Wilson, supra*. Therefore, it must be held that the rental agreement is not rendered unenforceable by Michigan’s statute of frauds. However, whether there was mutual assent remains an issue, as discussed above.

Even if the rental agreement was not assented to by an authorized representative of defendant, defendant concedes that the national agreement is controlling on the issue of its duties owed to Idealease of Flint: “Only the National Agreement governs.” Therefore, we will analyze the issues of insurance and indemnity under the national agreement, as they pertain to Idealease of Flint.

As explained above, the national agreement was modified by the addendum which precluded indemnity where it was for action “proved to be the direct responsibility or negligence of the Lessor” There is no contention that the indemnity sought by Idealease of Flint is for action resulting from the negligence of the Lessor, which is, under the national agreement,

Idealease Services, Inc. Therefore the addendum does not preclude Idealease of Flint's indemnity claim.

The next question is whether Idealease of Flint qualifies under any of the categories of entities entitled to receive indemnity: "Lessor, Owner, IDEALEASE, INC., and all Authorized Members." Since defendant concedes that it is the national agreement that controls, defendant cannot deny that the indemnification provision in the national agreement applies to Idealease of Flint's claim. Defendant also expressly admits that "Idealease of Flint was the 'Owner.'" Therefore, Idealease of Flint qualifies either under "Owner" or "all Authorized Members," and there is no evidence to the contrary.

Under the national agreement, indemnity is required for "All liability for . . . injury to Customer, its employees, drivers, passengers or agents arising out of the ownership, maintenance, use or operation of any Vehicle covered by this Agreement." Here, Head, the person injured, was a driver for defendant, and his injury arose out of the use of the truck, since he was driving it at the time of the accident, which defendant's representative concedes in his affidavit. Defendant contends that "[o]nly the National Agreement governs," and therefore, it concedes that the vehicle in question was covered by the national agreement. Thus, the terms of the indemnity promise are applicable, and indemnity is owed. Because defendant would owe indemnity under the national agreement to Idealease of Flint even if the rental agreement did not apply, the trial court's grant of summary disposition to defendant on this indemnity claim must be reversed.

The next issue is whether defendant breached a duty under the national agreement to provide insurance to Idealease of Flint. Defendant concedes that the national agreement governs its relationship with Idealease of Flint. Defendant argues, first, that the insurance terms are "hopelessly ambiguous." As has already been addressed above, this argument is not properly presented on appeal.

Defendant next argues that it "obtained liability insurance for the benefit of everyone" for whom it "could possibly have been required to" provide it; defendant notes that Travelers has been providing a defense to Idealease of Flint. Defendant's brief also concedes that "Idealease of Flint was the 'Owner.'" Accordingly, as to Idealease of Flint, defendant does not dispute that it had a duty to provide insurance under the terms of the national agreement. Therefore, the trial court's grant of summary disposition in defendant's favor and against Idealease of Flint, on this issue of insurance, must be reversed.

In sum, with respect to Tri-County, the trial court erred in granting summary disposition to defendant on the issue of indemnity, but did not err in granting summary disposition to defendant on the issue of insurance. With respect to Idealease of Flint, the trial court's grant of summary disposition in defendant's favor on the indemnity and insurance issues is reversed.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski